



United States Department of State

Washington, D.C. 20520

April 29, 2014

**By email**

Mr. Yves Derains  
The Hon. Michael Chertoff  
Mr. Vaughan Lowe, Q.C.  
c/o Ms. Evgeniya Goriatcheva  
Permanent Court of Arbitration  
Peace Palace, Carnegieplein 2  
2517 KJ The Hague  
The Netherlands

***Re: Detroit Bridge International Company v. Government of Canada,  
PCA Case No. 2012-25***

Dear Members of the Tribunal,

In accordance with the Tribunal's Procedural Order No. 7 dated March 25, 2014, non-disputing Party United States of America respectfully requests copies of the transcripts of the March 20-21, 2014 oral hearing in the above-noted case. The United States requires the transcripts in order to exercise its treaty right as a non-disputing NAFTA Party. NAFTA Article 1128 affords non-disputing Parties the right to "make submissions to a Tribunal on a question of interpretation of [the] Agreement." In order to effectively exercise this right, non-disputing NAFTA Parties require access to the disputing parties' evidence and arguments on treaty-interpretation questions. This necessarily requires access to evidence and arguments presented during oral hearings. Canada's April 17 letter to the Tribunal reported "extensive argument by Canada and DIBC and questioning from the Tribunal on the interpretation of Articles 1116, 1117, 1121, and the NAFTA negotiating texts at the March 20-21, 2014 hearing[.]"<sup>1</sup> The United States and Mexico must have access to this extensive argument and questioning in order to determine whether to exercise their treaty right to make further non-disputing Party submissions in this case.<sup>2</sup> To deprive the non-disputing Parties of this information would be to deprive them of an important aspect of their right to make "submissions" under Article 1128.

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<sup>1</sup> Letter from M. Luz to Tribunal dated Apr. 17, 2014, at 5.

<sup>2</sup> See email from A. Martínez to Tribunal dated Apr. 28, 2014 (requesting a copy of the transcript of the oral hearing).

The United States also supports Canada's request that the Tribunal amend its Confidentiality Order, so that the non-disputing Parties can exercise their treaty right to attend any future oral hearings in this case. All three NAFTA Parties have confirmed their longstanding view that the treaty authorizes non-disputing Parties to attend oral hearings, in order to effectively exercise their right under Article 1128 to make submissions on treaty-interpretation questions.<sup>3</sup> The NAFTA Parties' concordant, common, and consistent interpretation should be deemed the authentic interpretation of the treaty.<sup>4</sup> This concordant, common, and consistent interpretation has been given effect by every other NAFTA Chapter Eleven tribunal ever constituted, and we respectfully request that this Tribunal give it similar effect.

Respectfully submitted,



Jeremy K. Sharpe  
Chief, Investment Arbitration  
Office of International Claims and Investment  
Disputes

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<sup>3</sup> See Letter from M. Luz to Tribunal dated Apr. 17, 2014 (stating Canada's interpretation); Letter from L. Grosh to Tribunal dated Mar. 19, 2014 (stating the United States' interpretation); Letter from C. Véjar to Tribunal dated Mar. 19, 2014 (stating Mexico's interpretation).

<sup>4</sup> See Vienna Convention on the Law of Treaties, Art. 31(3) ("There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation[.]"); *Islamic Republic of Iran v. United States*, Case No. B1 (Counterclaim), Award No. ITL 83-B1-FT (Sept. 9, 2004), 38 IRAN-U.S. CL. TRIB. REP. 77, 118 (2010) ("The value of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent.") (quoting SIR IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 137 (2d ed. 1984)); Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 BRIT. Y.B. INT'L L. 203, 223 (1957) (observing that a consistent State practice "must come very near to being conclusive as to how the treaty should be interpreted"); PATRICK DAILLIER ET AL., *DROIT INTERNATIONAL PUBLIC* 277 (8th ed. 2009) ("The expression 'authentic interpretation' designates that which is furnished directly by the parties, as opposed to an unauthentic interpretation, which is given by a third party.") (translation by counsel).

Copies:

Mr. Carlos Véjar (Government of Mexico)  
Ms. Ana Carla Martínez (Government of Mexico)  
Ms. Sylvie Tabet (Government of Canada)  
Mr. Mark Luz (Government of Canada)  
Mr. Jonathan Schiller (for Claimant)  
Ms. Evgeniya Goriatcheva (PCA)